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OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY
FAIR HOUSING
AND
EQUAL OPPORTUNITY

MEMORANDUM FOR: All FHEO HUB Directors
All FHEO Program Center Directors
All FHEO Local Site Directors
All Grantees, Fair Housing Initiatives Program
All Grantees, Fair Housing Assistance Program

Eva M. Plaza
FROM: Eva M. Plaza, Assistant Secretary for Fair Housing and Equal Opportunity, E

SUBJECT: The Fair Housing Act and Lead-Based Paint

This memorandum transmits two documents which discuss the interaction of lead-based paint and Fair Housing Act requirements. It also provides further guidance on how the relationship between these two issues affect administration of the Section 8 tenant-based program. Fair Housing and Equal Opportunity (FHEO) staff, Fair Housing Initiatives Program (FHIP) grantees, and Fair Housing Assistance Program (FHAP) agencies are strongly encouraged to use this information to educate the public, conduct testing, and enforce the Fair Housing Act prohibited bases of familial status and disability in the context of lead-based paint.

A recent survey of FHEO Hubs concerning activities of the FHIPs and FHAPs in their jurisdictions showed that some were very involved in issues regarding the interaction of familial status and lead-based paint, particularly on the East Coast. Most, however, were not. We are, therefore, attaching two policy/guidance documents which have previously been made available about the interaction between the Fair Housing Act and lead-based paint requirements. The first is a "Memorandum" sent to all FHEO offices on August 1, 1997 (attached). It contains Questions and Answers regarding the interaction of these two sets of requirements for all housing in the country. The second is Section III D. 7 of the Preamble of the Final Rule on "Lead-Based Paint Hazards in Federally Owned Housing and Housing Receiving Federal Assistance," published in the Federal Register on September 15, 1999 (attached). This Preamble section explains how the requirements of the Fair Housing Act and Title II of the Americans with Disabilities Act impact on lead-based paint issues, particularly as applied to HUD-assisted housing.

Additional fair housing requirements are incorporated throughout the Lead-Based Paint regulation, and it is recommended that you become knowledgeable about them. We particularly want you to be aware of the Fair Housing Act/lead-based paint requirements for rental units with Section 8 tenant-based vouchers. In housing occupied by a Section 8

certificate or voucher holder, a lead-based paint inspection is generally not required for the Housing Quality Standards (HQS) inspections. However, the new lead-based paint regulation contains requirements for when a Public Housing Agency (PHA) must conduct an inspection for lead-based paint or lead-based paint hazards (e.g., when a child occupying the unit is found to have elevated blood lead levels). At such times, if a PHA becomes aware of lead paint hazards in the unit, the unit will automatically be in violation of HQS until the lead hazard is treated. A unit in violation of HQS may not be occupied by any tenant receiving Section 8 assistance regardless of familial status.

If there are any questions, please contact Ivy L. Davis, Director, Office of Programs. Her telephone number is (202) 708-2288, extension 7028.

Attachments



August 1, 1997

OFFICE OF THE ASSISTANT SECRETARY
FOR FAIR HOUSING AND EQUAL OPPORTUNITY

MEMORANDUM FOR: Directors, Fair Housing Enforcement Centers
Directors, Program Operations and Compliance
Centers

FROM: *Susan M. Forward*
Susan M. Forward, Deputy Assistant Secretary for
Enforcement and Investigations, EE

SUBJECT: Requirements Concerning Lead-Based Paint and the Fair
Housing Act

This document clarifies the interaction between lead-based paint hazard control activities and the requirements of the Fair Housing Act.

Children under the age of six are particularly vulnerable to lead poisoning both because they are more likely to ingest lead in housing situations and because ingested lead can adversely affect the development of children's brains, central nervous systems, and other organ systems. The importance of this issue has raised questions concerning lead-based paint and the requirements of the Fair Housing Act.

Question: May a housing provider affirmatively market units where lead-based paint hazards have been controlled to families with children?

Answer: Yes. Affirmatively marketing units where lead-based paint hazards have been controlled to families with children is consistent with fair housing laws and with the need to protect the public welfare. A housing provider may verbally or through advertisements advise the public or potential applicants for housing that such units are available, or that families with children are welcomed for such units. In addition, a housing provider may recommend a unit where lead-based paint hazards have been controlled to families with children under the age of six, or inform the family of the availability of a waiting list for units where lead-based paint hazards have been controlled.

Question: May a housing provider exclude families with children from units where lead-based paint hazards have not been controlled?

Answer: If a unit which has not undergone lead hazard control treatments is available and the family chooses to live in the

unit, the housing provider must advise the family of the condition of the unit¹, but may not decline to allow the family to occupy the unit because the family has children. Similarly, it would violate the Fair Housing Act for a housing provider to seek to terminate the tenancy of a family residing in a unit where lead-based paint hazards have not been controlled against the family's wishes because of the presence of minor children in the household. The housing provider may offer transfers, with or without incentives, to a family residing in a unit where lead-based paint hazards have not been controlled to enable the family to move to a unit where lead-based paint hazards have been controlled, including for the purpose of addressing hazards in the family's current unit.

Question: If resources allow lead-based paint hazards in only a few units to be controlled at a time, may these units be reserved for families with young children?

Answer: Housing providers may hold open vacant units where lead-based paint hazards have been controlled for families with young children and may offer such families a preference. However, as noted above, if units where lead-based paint hazards have not been controlled are available, a housing provider cannot refuse to allow a family with young children to live in such units. A housing provider must provide a family with young children information about the hazards of lead poisoning. If only a few units where lead-based paint hazards have been controlled are available at any given time, we recommend that such units be scattered throughout a site rather than segregated in one area.

Question: May housing providers give priority to addressing lead-based paint hazards in units occupied by families with small children?

Answer: Yes. As noted above, however, families cannot be required to vacate units in order to address lead-based paint hazards. (Families can of course be required to temporarily relocate to another dwelling unit so that the lead hazard control work may be done safely.) Nothing in this memo affects the separate obligation of a housing provider to make reasonable accommodations to people with disabilities.

¹ Section 1018 of the Residential Lead-Based Paint Hazard Reduction Act of 1992 (42 U.S.C. 4852d).

federal register

Wednesday
September 15, 1999

Part II

Department of Housing and Urban Development

24 CFR Part 35, et al.

**Requirements for Notification, Evaluation
and Reduction of Lead-Based Paint
Hazards in Federally Owned Residential
Property and Housing Receiving Federal
Assistance; Final Rule**

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

24 CFR Parts 35, 91, 92, 200, 203, 206, 280, 291, 511, 570, 572, 573, 574, 576, 582, 583, 585, 761, 881, 882, 883, 886, 891, 901, 906, 941, 965, 968, 970, 982, 983, 1000, 1003, and 1005

[Docket No. FR-3482-F-06]

RIN 2501-AB57

Requirements for Notification, Evaluation and Reduction of Lead-Based Paint Hazards in Federally Owned Residential Property and Housing Receiving Federal Assistance

AGENCY: Office of the Secretary-Office of Lead Hazard Control, HUD.

ACTION: Final rule.

SUMMARY: The purpose of this rule is to ensure that housing receiving Federal assistance and federally owned housing that is to be sold does not pose lead-based paint hazards to young children. It implements sections 1012 and 1013 of the Residential Lead-Based Paint Hazard Reduction Act of 1992, which is Title X of the Housing and Community Development Act of 1992. The requirements of this rule are based on the practical experience of cities, states and others who have been controlling lead-based paint hazards in low-income privately-owned housing and public housing through HUD assistance. It also reflects the results of new scientific and technological research and innovation on the sources, effects, costs, and methods of evaluating and controlling lead hazards. With today's action, HUD's lead-based paint requirements for all Federal programs are now consolidated in one part of title 24 of the Code of Federal Regulations.

DATES: Effective Dates: Section 35.140 is effective on November 15, 1999. All other provisions of the rule are effective on September 15, 2000.

FOR FURTHER INFORMATION CONTACT: For questions on this rule, call (202) 755-1785, ext. 104 (this is not a toll-free number) or e-mail your inquiry to lead_regulations@hud.gov. For lead-based paint program information, contact Steve Weitz, Office of Lead Hazard Control, Department of Housing and Urban Development, 451 7th Street, SW, Room B-133, Washington, DC 20410-0500. For legal questions, contact John B. Shumway, Office of General Counsel, Room 9262, Department of Housing and Urban Development. Hearing and speech-impaired persons may access the above telephone number via TTY by calling the toll-free Federal

Information Relay Service at 1-800-877-8339.

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I. Background

A. Lead Poisoning

Childhood lead poisoning causes reduced intelligence, low attention span, reading and learning disabilities, and has been linked to juvenile delinquency, behavioral problems, and many other adverse health effects. Over the past 20 years, the removal of lead from gasoline, food canning and other sources has been successful in reducing population blood lead levels by over 80 percent. Nearly 1 million children, however, still have excessive levels of lead in their blood, making lead poisoning a major childhood environmental disease (See CDC 1997a). Lead-based paint in housing is the major remaining source of exposure and is responsible for most cases of childhood lead poisoning today.

HUD estimates that over 60 million occupied homes, or approximately 80 percent of all homes built before 1980, have some lead-based paint. Many of those 60 million homes have only small amounts of such paint, however; generally, the older the home, the greater the amount of lead-based paint. The use of lead in paint was highest in housing built before 1960. It was completely banned for residential use in 1978 by the Consumer Product Safety Commission.

Higher childhood blood lead levels are associated with lower household income, residence in large urban areas, non-Hispanic African American race, and living in older homes. Recent data from the period 1991–1994 indicate that over 16 percent of young children of less than 6 years of age from low income families had blood levels above the level of concern set by the Centers for Disease Control and Prevention (CDC), compared with only one percent for young children from high income families. Over 8 percent of all young children living in housing built before 1946 had blood lead levels over the CDC level of concern compared to only 1.6 percent for those living in housing built after 1973. Over 11 percent of non-Hispanic African American children were above the CDC level of concern compared to 2.3 percent for non-Hispanic white children. Twenty-two percent of non-Hispanic African American children living in pre-1946 housing were over the CDC level of concern.

Childhood lead poisoning is "the most common environmental disease of young children," (CDC 1990) eclipsing all other environmental health hazards found in the residential environment (ATSDR 1988). Lead is highly toxic and affects virtually every system of the body. At high exposure levels, lead poisoning can cause coma, convulsions, and death. While adults can suffer from excessive lead exposures, the groups most at risk are fetuses, infants, and children under age 6. At low levels, the neurotoxic effects of lead have the greatest impact on children's developing brains and nervous systems, causing reductions in IQ and attention span, reading and learning disabilities, hyperactivity, and behavioral problems. These effects have been identified in many carefully controlled research studies (National Academy of Sciences 1993; HUD 1997). The vast majority of childhood lead poisoning cases, however, go undiagnosed and untreated, since most poisoned children have no obvious symptoms.

The Residential Lead-Based Paint Hazard Reduction Act of 1992 (Pub. L.

101–550; 42 U.S.C. 4851 *et seq.*), which hereafter is referred to as "Title X" because it is Title X of the Housing and Community Development Act of 1992, redefines the concept of "lead-based paint hazards." Under prior Federal legislation, a lead-based paint hazard was defined as any paint greater than or equal to one milligram of lead per square centimeter (mg/cm²), regardless of its condition or location. Title X states that a lead-based paint hazard is "any condition that causes exposure to lead from lead-contaminated dust, lead-contaminated soil or lead-contaminated paint that is deteriorated or present in chewable surfaces, friction surfaces, or impact surfaces that would result in adverse human health effects." Thus, under this definition, intact lead-based paint on most surfaces is not considered a "hazard," although the condition of the paint should be monitored and maintained to ensure that it does not become deteriorated.

Title X defines two methods of "evaluating" lead-based paint hazards or lead-based paint. One method, "risk assessment," includes dust wipe sampling and other environmental sampling to identify lead-based paint hazards. The other, "inspection" (or "lead-based paint inspection"), determines the presence only of lead-based paint. Evaluation may also be accomplished by a combination of the two methods. The combination approach results in an identification of all lead-based paint and lead-based paint hazards. Title X provides for three types of lead-based paint "hazard reduction": Interim controls, abatement of lead-based paint hazards, and complete abatement of all lead-based paint. Interim controls are "measures designed to reduce temporarily human exposure or likely exposure to lead-based paint hazards." Abatement means "a set of measures designed to permanently eliminate lead-based paint hazards" or lead-based paint. To ensure that evaluation and hazard reduction are carried out safely and effectively, Title X authorizes new requirements for consistency and quality control.

B. Legislative and Regulatory History

The existing lead-based paint regulations pertaining to the Department's programs, as well as to all federally owned residential property at the time of sale, were written pursuant to the passage of the Lead-Based Paint Poisoning Prevention Act of 1971, as amended prior to 1992 (42 U.S.C. 4821 *et seq.*). This legislation required the Secretary to "establish procedures to eliminate as far as practicable the hazards of lead-based paint poisoning

addresses of environmental intervention blood lead level children from the health department), except that such a report to the health department is not required if the health department states that it does not wish to receive it.

(3) The address match may be done by either the housing or the health agency. HUD's intent is to encourage workable cooperative arrangements between the two types of agencies for the purpose of matching environmental intervention blood lead level and housing assistance information on a timely basis.

With regard to the evaluation and hazard reduction that must be done if a child with an environmental intervention blood lead level is found to be residing in a HUD-assisted or HUD-owned unit, the final rule sets one uniform requirement for all programs: risk assessment and interim controls, followed by ongoing lead-based paint maintenance. One commenter complained that the proposed rule failed to require anything beyond interim controls—a standard, the commenter said, that is “too low and ineffective in the face of a poisoned child.” Current information shows that interim controls are as effective as abatement methods in the short term and will continue to provide adequate protection if continuing maintenance standards are met (National Center 1998). In the final rule, ongoing lead-based paint maintenance is required in all HUD housing programs for which there is also a requirement that interim controls be conducted in response to a case of a child with an environmental intervention blood lead level. To ensure that these requirements are not avoided, the rule states that the requirements apply regardless of whether the child with the environmental intervention blood lead level is or is not still living in the assisted unit. Furthermore, it is HUD's intent that the requirements apply to the unit even if no child of less than six years of age resides in the unit, because the requirements were triggered when a child was in residence. Also, if a public health department performs the evaluation of the dwelling unit or, after the hazard reduction work is performed, certifies the unit to be lead safe, it is not necessary for the housing agency or other designated party to perform those functions. Finally, in the case of housing to which subpart M (tenant-based rental assistance) applies, if the hazard reduction is not performed, the unit does not meet Housing Quality Standards.

Some local housing agencies have asked for guidance on what their response should be to information on a child's blood lead level if the

information is brought to the agency by a party other than a medical health care provider. In response, the Department is including a provision requiring verification of such data with the public health department or other medical health care provider. If it is verified that a child has an environmental intervention blood lead level, the agency, owner, or HUD (as the case may be) must complete a risk assessment and conduct interim controls of identified hazards.

7. Fair Housing Requirements. Several commenters expressed concern about the potential for housing discrimination against families with children in general, and those with children with environmental intervention blood lead levels in particular. Therefore HUD is providing the following discussion of the application of the Fair Housing Act and other laws pertaining to persons with disabilities to lead-based paint issues.

The Fair Housing Act prohibits discrimination in housing based on race, color, national origin, religion, sex, disability, and familial status. Familial status, for purposes of the Fair Housing Act, includes children under 18 (regardless of age or number), pregnant women, and people seeking custody of children under 18. Only providers of housing that meets the specific definition of housing for older persons may refuse to rent to families with children. Children with elevated blood lead levels and persons with Multiple Chemical Sensitivity (MCS) may fall under the definition of persons with disabilities. Among the actions prohibited under the Fair Housing Act are any action which differentiates on a prohibited basis for any of the following: Refusal to rent or sell housing; refusal to negotiate for housing; making a dwelling unavailable; denying a dwelling; providing different housing services or facilities; falsely stating that housing is not available for inspection, sale, or rental; refusing to make a mortgage loan; imposing different terms or conditions on a loan; setting different terms, conditions, or privileges for sale or rental of a dwelling; segregating a portion of the population into special buildings or areas; maintaining different lease conditions; and advertising or making any statement that indicates a limitation or preference based on any prohibited basis of the Fair Housing Act.

Based on this law, it is illegal for owners of housing to discriminate against families with children, or EBL children, even if the unit is known to have lead-based paint hazards. The prohibitions of the Fair Housing Act

would further make it inadvisable to ask questions about EBL status, pregnancy, or intentions to become pregnant. Restrictive covenants against children, including EBL children, are also illegal. Therefore, no renter or buyer may be asked to sign a statement that a child, or EBL child, is not expected to reside in the dwelling. Owners of rental housing may eliminate lead-based paint hazards in a percentage of units and hold those units available for families with children and affirmatively market them to appropriate families. An owner may also tell families of the danger of moving into a unit which has not been treated and recommend an alternative comparable unit. In no case may an owner refuse to allow a family to occupy the unit, however, because of the presence of a child or require that a family move because lead is found. Laws against discrimination will be enforced by HUD.

Title II of the Americans With Disabilities Act (ADA) establishes a clear and comprehensive prohibition against discrimination on the basis of disability in State and local government services. Section 504 of the Rehabilitation Act of 1973 provides for nondiscrimination against persons with disabilities in Federally-assisted housing. Both laws define a person with a disability as any person who has a physical or mental impairment that substantially limits one or more major life activities, has a record of an impairment, or is regarded by others as having such an impairment. Under both laws, EBL children and persons with MCS may fall under the definition of persons with disabilities. Among the actions prohibited under Title II of the ADA and Section 504 are those which discriminate, on the basis of disabilities, in Federally-assisted programs, services, and activities. Such actions include a refusal to (1) allow participation in a program, service, or activity; (2) provide programs, services and activities in an integrated setting, unless separate or different measures are necessary to ensure equal opportunity; (3) eliminate unnecessary eligibility standards or rules that deny an equal opportunity to enjoy a program, service or activity unless “necessary” for the provisions of the program, service or activity; (4) make reasonable modifications in policies, practices, and procedures that deny equal access, unless a fundamental alteration in the program would result; (5) make reasonable accommodations, unless an undue burden or fundamental alteration would result, e.g., furnish auxiliary aids and services when necessary to ensure effective

communication (e.g., interpreters, or accessible formats, such as braille, large print, or audio cassette) and/or provide notice to and relocate residents with MCS prior to removing lead-based paint hazards with harmful toxic chemicals; and (6) operate programs so that, when viewed in their entirety, they are readily accessible to, and usable by, individuals with disabilities. A covered housing provider must not impose special charges to pay for measures necessary to ensure nondiscriminatory treatments, such as relocation expenses when necessary to remove lead-based paint hazards, or making modifications to provide accessibility. Finally, it is unlawful under these laws for a covered housing provider to make inquiries into the nature and severity of a person's disability, although that information may be volunteered when a reasonable accommodation is requested.

8. *Qualification Requirements.* The proposed rule required that most lead-based paint inspections, risk assessments and abatements be conducted by individuals or firms that are certified in accordance with national EPA requirements for lead-based paint activities developed pursuant to sections 402 and 404 of the Toxic Substances Control Act (TSCA). EPA published a final rule on August 29, 1996 that takes full effect on August 29, 1999. After that time, all lead-based paint inspections, risk assessments, and abatements nationwide will have to be conducted in accordance with the EPA work practices standards at 40 CFR 745.227 or State or tribal standards that have been authorized by EPA under procedures set forth at 40 CFR part 745, subpart Q. Recognizing that there might be temporary limitations on the supply of certified personnel, HUD proposed to provide for the possibility of temporary qualifications.

The proposed rule included two apparent exceptions to this general certification requirement. Public and Indian housing agencies ("HAs") conducting dust and soil testing for public and Indian housing were not required to be certified in accordance with the EPA requirements. The Department pointed out that HAs were required to complete lead-based paint inspections by December 6, 1994, and that many HAs have already taken the initiative to conduct risk assessments in housing projects. Further, HUD did not extend the certification requirement to dust testing conducted by HAs for the Section 8 tenant-based rental assistance program. The Department, however, did require that a risk assessment conducted in response to an identified environmental intervention blood lead

level child be conducted by a certified risk assessor.

Certification requirements in the proposed rule were somewhat different for interim controls than for abatement. Recognizing that the EPA regulations do not cover interim controls, HUD proposed that all workers performing interim controls be trained in accordance with the basic Occupational Safety and Health Administration (OSHA) hazard communication standard at 29 CFR 1926.59 and supervised by a certified abatement supervisor.

Comments on the qualifications requirements dealt with five issues: (1) Whether housing agency personnel had to be certified to perform dust and soil testing; (2) the availability of qualified personnel and firms, and temporary qualifications in case of an inadequate supply of certified personnel; (3) qualification requirements for interim controls; (4) the independence of the clearance examiner; and (5) the authority of a trained technician to perform clearance examinations.

EPA objected to the exemption of public and Indian housing authorities from certification requirements related to dust and soil testing. EPA did not accept HUD's rationale for suggesting that noncertified personnel could perform lead-based-paint-related functions for public and Indian housing agencies, other than under emergency circumstances. On the other hand, another commenter said he was "pleased" that dust testing would be permitted in that program by non-licensed Housing Quality Standards (HQS) inspectors trained in lead-hazard evaluation. The commenter recommended that "non-licensed, but trained" rehabilitation inspectors similarly be allowed to accomplish clearance testing in the funded rehabilitation programs. A public interest commenter remarked that "HUD should begin the process of educating these workers at once, so that a qualified work force is available when the requirements go into effect."

A local funded agency indicated that its State law would not allow Section 8 housing inspectors to perform inspections requiring dust wipes, and the agency went on to say that licensure for inspectors costs \$250, renewable every two years, and that risk assessment training ran to \$300 per person. Costs to housing authorities, and to landlords, for importing licensed personnel to perform inspections and assessments were regarded as prohibitive by the commenter.

The Department has decided to require in the final rule that dust and

soil testing in public housing be conducted by personnel certified in accordance with an EPA-authorized State or tribal program or EPA regulations, a provision that is also in accordance with many State laws. Also, dust testing in housing assisted through tenant-based rental assistance will not be required at the evaluation stage, so the qualification issue for that function is no longer relevant; but clearance of the dwelling unit (or, in some cases, only the worksite) will be required if paint stabilization, interim controls or abatement is required. See the discussion below of the authority of trained technicians to perform clearance examinations.

There was much concern among commenters about the availability of a qualified (and affordable) work force of persons certified (or otherwise adequately trained) to perform the necessary work called for in the rule. Rural housing suppliers claimed such trained people would have to be imported from far away—and at premium rates. There were also calls for reciprocity for State-approved training programs until the EPA-approved programs are implemented.

HUD expects that most States will have EPA authorized certification programs by the effective date of this rule. Those that do not will be covered by the EPA certification program directly. After August 29, 1999, inspections, risk assessments and abatements must be done in accordance with the standards of EPA or an authorized State or tribal program. While this fact does not in itself eliminate the possibility that there will be shortages in the supply of certified personnel for inspections, risk assessments and abatements in some parts of the country, it increases the likelihood that the certification mechanisms will be in place in most of the nation when this rule becomes effective. At the time of this writing, 37 States have already enacted lead-based paint hazard control laws. In the final rule, the Department has made one change to the qualifications requirements that may result in increased availability of persons qualified to perform clearances. See the discussion below of the authority of technicians to perform clearance examinations.

The Department intends to monitor the availability of qualified personnel. One source of information is likely to be the "Lead Listing," a nationwide listing of inspectors and risk assessors developed by the National Lead Assessment and Abatement Council (NLAC) with HUD assistance. The